

1 ALSTON & BIRD LLP
2 Derin B. Dickerson, GA Bar #220620 (*admitted pro hac vice*)
3 Caroline R. Strumph, GA Bar #250168 (*admitted pro hac vice*)
4 Shanique C. Campbell, GA Bar #346659 (*admitted pro hac vice*)
5 1201 West Peachtree Street
6 Atlanta, GA 30309-3424
7 Telephone: 404-881-7000
8 derin.dickerson@alston.com
9 caroline.strumph@alston.com
10 shanique.campbell@alston.com

11 Kathleen Benway, DC Bar #474356 (*admitted pro hac vice*)
12 950 F Street, NW
13 Washington, DC 20004
14 Telephone: 202-239-3034
15 kathleen.benway@alston.com

16 Lisa L. Garcia, CA Bar #301362 (*admitted pro hac vice*)
17 350 South Grand Avenue, 51st Floor
18 Los Angeles, CA 90071
19 Telephone: 213-576-1147
20 lisa.garcia@alston.com

21 ***Attorneys for Defendant Grand Canyon Education, Inc.***

22 **UNITED STATES DISTRICT COURT**
23 **DISTRICT OF ARIZONA**

24 Federal Trade Commission,
25 Plaintiff,
26
27 vs.
28 Grand Canyon Education, Inc.;
Grand Canyon University, Inc.; and
Brian E. Mueller,
Defendants.

24 No. 2:23-cv-02711-DWL

25 **GRAND CANYON EDUCATION,
26 INC.'S PARTIAL MOTION TO
27 DISMISS AND MEMORANDUM IN
28 SUPPORT**

24 **ORAL ARGUMENT REQUESTED**

1

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1 **I. INTRODUCTION**

2 After a nearly two-year long investigation, the Federal Trade Commission (“FTC”)
3 filed the instant Complaint filled with dubious allegations of misrepresentations. The
4 Complaint does not identify any actual misrepresentations that harm or mislead students.
5 Instead, the FTC attempts to impose significant civil penalties on Defendants based on true
6 statements that accurately reflect Grand Canyon University’s (“GCU”) tax-exempt status and
7 the minimum length of some of its doctoral degree programs. Specifically, the Complaint
8 alleges that Grand Canyon Education (“GCE”), along with GCU, and GCE CEO and GCU
9 President Brian E. Mueller: (1) falsely represented that GCU is a non-profit institution, and
10 (2) falsely represented that GCU doctoral degrees are typically completed in 20 courses or 60
11 credits. (Counts I, II, and III).¹ Based on these allegations, the FTC asserts claims under the
12 Federal Trade Commission Act (“FTC Act”) and the FTC’s Telemarketing Sales Rule
13 (“TSR”). Each of the FTC’s claims fail as a matter of law for at least four reasons:

14 ***First***, the allegation that Defendants falsely represented that GCU is a nonprofit cannot
15 form the basis of a claim for deceptive acts because GCU *is* a nonprofit, tax-exempt
16 organization. The Internal Revenue Service (“IRS”), the State of Arizona, and the Higher
17 Learning Commission (“HLC”) all recognize GCU as a nonprofit. Accordingly, it is not false
18 or misleading for GCE to market GCU as a nonprofit institution, and any such representation
19 is not actionable under the FTC Act.

20 ***Second***, the FTC has not plead that any misrepresentations regarding GCU’s nonprofit
21 status were “material” to consumers. Because the FTC has not even attempted to satisfy this
22 element of a Section 5(a) claim under the FTC Act, the claim necessarily fails.

23 ***Third***, the allegation that Defendants falsely represented that GCU doctoral degrees are
24 “typically” completed in 20 courses or 60 credits cannot form the basis of a claim for deceptive
25 acts because the FTC has failed to allege a single instance of GCE—or any Defendant—

26

¹ Plaintiff also alleges that Defendants contacted individuals on the do-not-call registry and
27 individuals who asked not to be contacted (Counts IV and V). GCE does not move to
28 dismiss Counts IV and V in this Motion. GCE does not admit the truth of the allegations
supporting Counts IV and V or concede the merits of the FTC’s claims.

1 making such a representation. *See* Compl. ¶ 71(a). To the extent the FTC attempts to rely on
2 a representation that students can earn a degree in 60 credits, the claim fails because such a
3 representation is not deceptive. Doctoral students *can* in fact earn a degree in 60 credits. The
4 enrollment agreement excerpted in the Complaint (a GCU document, which does not reflect
5 any statement by GCE) shows only the **minimum** courses and credit hours necessary to earn
6 a doctoral degree. As with any doctoral program that requires a dissertation, the time it takes
7 a student to complete a doctoral degree program varies for reasons unique to each student,
8 including the student's dissertation strategy, the student's approach to her chosen topic, the
9 student's aptitude and academic background, and the student's life circumstances that permit
10 her to devote time toward the degree. GCU, like any institution of higher education, does not
11 guarantee that students will complete their required coursework in a certain period of time.

12 **Fourth**, the FTC's fraud-based claims fail to satisfy Rule 9(b)'s heightened pleading
13 standard because the Complaint does not identify the who, what, why, where, and when of the
14 alleged fraud. Instead, the Complaint impermissibly lumps all Defendants together without
15 indicating which Defendants were responsible for what alleged conduct.

16 For these and other reasons outlined below, GCE requests that the Court grant its partial
17 motion to dismiss Counts I, II, and III.

18 **II. BACKGROUND**

19 GCU is a comprehensive, regionally accredited Christian university that has for decades
20 provided an affordable education to hundreds of thousands of students on its 260-acre campus
21 in Phoenix, Arizona. GCU offers more than 200 graduate and undergraduate degree programs
22 both online and in person. GCE is a services provider that serves colleges and universities
23 around the country, including GCU. GCE provides a suite of support services, including
24 marketing, advertising, technology, and student counseling. GCE's partnership with GCU has
25 worked extraordinarily well, helping GCU to focus on providing a top-rate education to often
26 underprivileged students at an affordable cost. Notably, GCE has more than twenty university
27 partners in addition to GCU.

28

1 GCU has served undergraduate and graduate students since at least 1951² when it first
2 operated as a nonprofit, Baptist college in Phoenix, Arizona. (Compl. ¶ 10). In the early
3 2000s, GCU was purchased by a group of investors who installed new leadership, shifted
4 GCU's focus from an exclusively in-person institution to a dual in-person and online
5 university, and began operating the school as a proprietary education institution. *Id.* Through
6 June 30, 2018, Grand Canyon Education, Inc. d/b/a Grand Canyon University was the legal
7 entity that operated the school and provided educational services to students. (Compl. ¶ 5).
8 On July 1, 2018, GCE sold the educational assets of Grand Canyon University, along with its
9 name, to a standalone, nonprofit organization that simultaneously changed its name to Grand
10 Canyon University. The conversion back to nonprofit, tax exempt status enabled GCU to more
11 fully engage in its academic mission. GCU has been recognized by the IRS as a 501(c)(3) tax-
12 exempt organization since July 1, 2018 to the present. (Request for Judicial Notice at 2-3).

13 **III. STANDARD OF REVIEW**

14 Pursuant to Rule 12(b)(6), if a complaint fails to state a legally cognizable claim, it must
15 be dismissed. *Jones v. Bock*, 549 U.S. 199, 215 (2007). While the law does not require
16 “detailed factual allegations . . . a formulaic recitation of the elements of a cause of action will
17 not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To determine the sufficiency
18 of alleged claims, a court should first identify and reject any conclusory allegations which,
19 “because they are no more than conclusions, are not entitled to the assumption of truth,”
20 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), and then determine if the complaint gives the
21 defendant fair notice of a legally cognizable claim, *Twombly*, 550 U.S. at 555.

22 In addition, where, as here, a plaintiff alleges claims based on fraud, the complaint must
23 also satisfy Federal Rule of Civil Procedure 9(b)’s particularity requirements. Rule 9(b)
24 applies to claims brought under Section 5 of the FTC Act because such claims “sound in fraud”
25 and must allege a “unified course of fraudulent conduct and relies entirely on that course of
26 conduct as the basis of the claim.” *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 852-53

27
28 ² GCU—originally Grand Canyon College—was chartered on Aug. 1, 1949, with
approximately 100 students in Prescott, AZ. In 1951, the college relocated to Phoenix.

1 (C.D. Cal. 2010) (noting similarities between claims brought under Section 5 of the FTC Act
2 and claims for negligent misrepresentation, which are subject to Rule 9(b)'s heightened
3 pleading standard). Accordingly, claims for violation of Section 5(a) of the FTC Act must
4 state with particularity “the who, what, when, where, and how of the misconduct
5 charged.” *Vess v. Ciba—Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.2003) (internal
6 quotation marks omitted); *see also Lights of Am.*, 760 F. Supp. 2d at 854 (finding the FTC fails
7 to allege the “who, what, when, where, and how” of the fraud because “the allegations do not
8 differentiate between conduct committed by [the three defendants], nor do they explain when
9 or where the alleged misrepresentations were made”).

10 **IV. ARGUMENT**

11 **A. The FTC Has Failed to Allege a Violation of Section 5(a) of the FTC Act
12 or the TSR Regarding Representations About GCU’s Nonprofit Status
13 (Counts I and III).**

14 To state a claim for deceptive acts or practices under Section 5 of the FTC Act, a
15 plaintiff must allege (1) a “representation, omission, or practice that” (2) “is likely to mislead
16 consumers acting reasonably under the circumstances,” and is (3) “material.” *FTC v.
17 Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009). While “[d]eception may be found based on the
18 ‘net impression’ created by a representation,” the net impression must be one that is “likely to
19 mislead reasonable consumers.” *FTC. V. Direct TV, Inc.*, No. 15-cv-01129-HSG, 2018 U.S.
20 Dist. LEXIS 139192, *18 (N.D. Cal. Aug. 16, 2018). Similarly, to state a claim for deceptive
21 telemarketing practices under the TSR, a plaintiff must allege that a telemarketer
22 misrepresented “[a]ny material aspect of the performance, efficacy, nature, or central
23 characteristics of goods or services that are the subject of a sales offer.” *Consumer Fin. Prot.
24 Bureau v. Prime Mktg. Holdings, LLC*, No. CV 16-07111-BRO (JEMx), 2016 U.S. Dist.
25 LEXIS 194873, at *19 (C.D. Cal. Nov. 15, 2016).

26 The FTC has failed to meet its threshold pleading requirement because: (i) it has not
27 alleged any false representation or omission by GCE regarding GCU’s nonprofit status, and
28 (ii) it has not demonstrated that any alleged representation or omission by GCE was material

1 to any consumer's decision to attend GCU.

2 **B. Counts I and III Fail as a Matter of Law Because the FTC Has Not**
3 **Alleged an Actionable Representation by GCE Regarding GCU's**
4 **Nonprofit Status.**

5 In Counts I and III, the FTC alleges that "Defendants"³ violated the FTC Act and TSR
6 by falsely representing that GCU is a nonprofit institution and "transitioned back to its prior
7 manner of operating as a nonprofit institution." (Compl. ¶ 68). This alleged representation is
8 not actionable because it is true and unlikely to mislead prospective students.

9 "The test for a violation of Section 5 of the [FTC Act] is whether the representations
10 are likely to deceive consumers." *FTC v. NCH, Inc.*, No. 95-16893, 1997 U.S. App. LEXIS
11 760, at *7 (9th Cir. Jan. 15, 1997). Accordingly, to state a claim, the FTC must allege the
12 existence of deceptive representations. Courts have described representations as deceptive
13 where "the maker of the representation lacks a reasonable basis for the claim." *FTC v. OMICS*
14 *Grp. Inc.*, 302 F. Supp. 3d 1184, 1190 (D. Nev. 2017) (citing *FTC v. Direct Mktg. Concepts*,
15 *Inc.*, 624 F.3d 1, 8 (1st Cir. 2010)). The FTC's Section 5 and TSR claims here fail because
16 GCE did not make any false representations about GCU's nonprofit status.

17 It is undisputed that GCU is recognized as a nonprofit institution by the IRS, the State
18 of Arizona, and the HLC. (Request for Judicial Notice at 2-3). During the time period in
19 which GCE allegedly made representations that GCU was a nonprofit entity, every federal,
20 state, and quasi-regulatory agency to opine on the issue recognized GCU as a nonprofit entity.
21 Indeed, to this date, GCU's accrediting agency, the HLC, identifies GCU on its public-facing
22 website as a private not-for-profit school. *Statement of Accreditation Status*, Higher Learning
23 Comm'n,

24 [https://www.hlcommission.org/component/directory/?Action>ShowBasic&Itemid=&instid=](https://www.hlcommission.org/component/directory/?Action>ShowBasic&Itemid=&instid=1005)
25 1005 (last visited Feb. 9, 2024) ("Control: Private NFP"). Unlike the State of Arizona and the

26 ³ The FTC improperly groups all Defendants together in its allegations and fails to allege
27 specifically which Defendant made which alleged misleading representation or omission.
28 For this reason, the Complaint fails to state a claim under both Rule 9(b)'s heightened
pleading standard for claims sounding in fraud and Rule 8. *See* Section III.

1 IRS, which are statutorily charged with determining non-profit and 501(c)(3) tax-exempt
2 status, the Department of Education (“ED”) has refused to recognize GCU as a nonprofit for
3 purposes of its participation in programs under Title IV of the Higher Education Act (“HEA”),
4 20 U.S.C. § 1070 *et seq.* However, ED’s determination for Title IV purposes does not alter
5 the fact that GCU is a nonprofit, 501(c)(3) organization under the law. Accordingly, GCE had
6 more than a reasonable basis for identifying GCU as a nonprofit.

7 Indeed, it was patently reasonable for Defendants to identify GCU as a nonprofit given
8 ED’s historical deference to the IRS in determining whether an institution is a nonprofit. The
9 Department of Education regulations explicitly provide that an institution “may show that it is
10 a nonprofit organization by . . . [p]roof that the Internal Revenue Service currently recognizes
11 the [institution] as an organization to which contributions are tax deductible under Section
12 501(c)(3) of the Internal Revenue Code.” 34 C.F.R. § 75.51; *see also OMICS Grp. Inc.*, 302
13 F. Supp. 3d at 1190. According to the allegations in the Complaint, Defendants advertised
14 GCU as a nonprofit from July 2018 to November 2019. (Compl. ¶¶ 21-24). During this entire
15 time period, GCE did not know that ED would later make an incongruent departure from the
16 prior decisions of the IRS, the State of Arizona, and HLC. GCE cannot be held liable for
17 truthful statements that were not misleading to prospective students because GCU was (and
18 is), in fact, a nonprofit, tax-exempt entity.

19 Moreover, the Complaint acknowledges that Defendants stopped referring to GCU as
20 a nonprofit shortly after ED informed GCU of its decision not to recognize the school as a
21 nonprofit for Title IV purposes.⁴ (Compl. ¶ 24). Indeed, the FTC does not allege a single
22 instance *after* November 2019 when GCE represented to prospective students that GCU was
23 a nonprofit institution. *See generally* Compl. ¶¶ 21-26. Accordingly, the FTC has not alleged
24 a material representation that is “likely to mislead consumers acting reasonably under the
25 circumstances.” *Stefanchik*, 559 F.3d at 928.

26

27 ⁴ The separate question of whether ED was permitted under the law to deny GCU of its
28 nonprofit status for purposes of the HEA, after the IRS made a different determination, is the
subject of an appeal currently pending before the Ninth Circuit Court of Appeals. *See Grand
Canyon University v. Cardona, et al.*, No. 2:21-cv-00177 (D. Ariz.).

Because any representations that GCU was (and is) a nonprofit entity were true, such alleged representations are not deceptive, *OMICS Grp. Inc.*, 302 F. Supp. 3d at 1190, and do not support a claim for violation of Section 5(a) of the FTC Act or the TSR. The Complaint does not allege an actionable false or misleading representation made by GCE about GCU's nonprofit status, and thus, Counts I and III fail and should be dismissed.

C. Counts I and III Also Fail as a Matter of Law Because the FTC Has Not Alleged That Any Representation by GCE Regarding GCU’s Nonprofit Status Was Material to Consumers.

To state a claim under Section 5(a) of the FTC Act or deceptive telemarketing under the TSR, the FTC must also allege that a misleading representation or omission was *material* to the consumer. 16 C.F.R. § 310.3(a)(2)(i), (iii); *see also Prime Mktg. Holdings*, 2016 U.S. Dist. LEXIS 194873, at *19. “A representation is material if it involves information likely to affect a consumer’s decision to purchase a particular product or service.” *FTC v. Real Wealth, Inc.*, No. 10-0060-CV-W-FJG, 2011 U.S. Dist. LEXIS 52566, at *6-7 (W.D. Mo. May 17, 2011). The FTC has not even attempted to satisfy this pleading requirement.

The FTC alleges that it was misleading to call GCU a nonprofit because students would be confused and infer that GCU was a nonprofit for Title IV purposes. Even if prospective students were confused, the FTC would have to sufficiently allege that confusion over GCU's Title IV nonprofit status was material. The FTC has failed to make this showing.

The FTC has not sufficiently alleged that it was material to prospective students considering enrolling in GCU that although GCU was recognized as a nonprofit institution by the State of Arizona and the IRS, ED did not recognize GCU as a nonprofit exclusively for purposes of its participation in programs under Title IV of the Higher Education Act. It defies common sense to conclude that prospective students are even aware of the regulatory implications of a nonprofit designation under the HEA regulations, let alone that the designation would impact their decision to enroll. This is especially true given that there is no impact to a student's ability to access Title IV funds.

To be sure, the Complaint contains no allegations that support the materiality element

1 of Plaintiff's claims and instead alleges in conclusory fashion that "[t]he representations that
2 GCU was a nonprofit and had 'transitioned back' to its non-profit roots were material to
3 consumers" and that "Defendants" made these representations "to induce enrollment."
4 (Compl. ¶¶ 22-23). The FTC does not provide factual allegations describing *why* consumers
5 would allegedly find that information material to their enrollment decision or *how* it would
6 influence their decision. This is the exactly the type of conclusory allegation that is insufficient
7 under the law. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 679; *see also Robinson v. JP*
8 *Morgan Chase Bank, NA*, No. CV-22-00687-PHX-SMB, 2023 U.S. Dist. LEXIS 122595, at
9 *8 (D. Ariz. July 14, 2023) (granting motion to dismiss where plaintiff provided no facts and
10 only conclusory statements in the complaint).

11 Accordingly, Counts I and III also fail because the Complaint fails to allege that
12 deceptive or false representations were material.

13 **D. Counts II and III Fail as a Matter of Law Because the FTC Has Not**
14 **Alleged an Actionable Representation or Omission Regarding GCU's**
15 **Doctoral Program.**

16 **1. GCE Did Not Misrepresent the Time It Takes To Complete A GCU**
17 **Doctoral Program.**

18 In Counts II and III, the FTC alleges that "Defendants" violated the FTC Act and TSR
19 by falsely representing that GCU doctoral degrees are "typically" completed in twenty courses
20 or 60 credits. (Compl. ¶ 71). The FTC fails to state a claim for at least two reasons.

21 *First*, contrary to the allegation in Paragraph 71 of the Complaint, the FTC does not
22 identify a single representation that GCU doctoral degrees that include a dissertation "*are*
23 *typically* completed in twenty courses or 60 credits." Counts II and III are, thus, based on an
24 alleged representation that is not reflected anywhere in the Complaint. *Robinson*, 2023 U.S.
25 Dist. LEXIS 122595, at *8 (conclusory allegations are insufficient under the law).

26 *Second*, the FTC has not identified any misrepresentations regarding GCU's doctoral
27 programs. The FTC appears to base its claims on documents describing GCU doctoral
28 programs as "requir[ing] a total of 60 credits" and enrollment agreements listing twenty "Core

1 Courses.” (Compl. ¶ 51). The FTC alleges that these representations are misleading because
2 many students (though not all) must enroll in additional “continuation courses” to satisfy their
3 dissertation requirements to earn their doctoral degree.⁵ (Compl. ¶¶ 56-57). However, the
4 documents relied upon reveal the deficiencies in the FTC’s claims.

5 The enrollment agreement—which is a GCU document and does not reflect any
6 representation by GCE—outlines the twenty “Required Program Major Courses” that a student
7 must complete to earn a doctorate in business administration. As clearly expressed in the
8 document, these are the minimum “required” courses. It also states in **bold** lettering in the
9 middle of the same page that “**A minimum of 60 credits are required for completion of this**
10 **program of study.**” (Compl. ¶ 52) (bold in original; italics added). By definition, “minimum”
11 reflects the least number of credits required, not the most. In other words, GCU designed a
12 program that *can* be completed in 60 credit hours, which is the fastest degree track. Defendants
13 never represented that students were guaranteed to complete their required coursework and
14 their dissertation in those 60 credit hours. The FTC’s conclusory allegations of deceptive
15 representations simply do not square with the actual representations made.

16 The FTC’s reliance on the Course List on GCU’s website fares no better. The website
17 discloses the minimum number of courses required (60 credits) and does not make any
18 statements that doctoral degrees are “typically” completed in twenty courses or 60 credits.
19 Listing the minimum courses on the website cannot be reasonably read to suggest that students
20 typically complete their degree in twenty courses or 60 credits, especially given the FTC’s
21 admission that Defendants “represent that GCU’s College of Doctoral Studies will award
22 individuals who complete the prescribed courses and produce a dissertation of academic
23 quality research in their chosen field.” (Compl. ¶ 52) (emphasis added).

24 The Complaint’s allegation that unspecified Defendants train telemarketers to inform
25 prospective students that the GCU program “**could** be completed a lot faster than” a “typical

26 ⁵ Though not a basis of this motion, GCE understands that GCU actually loses money on
27 continuation classes. There is no incentive—financial or otherwise—to “require” students to
28 take continuation courses. Students enroll in continuation courses if they need additional
time and support to complete their dissertation.

1 seven-year doctorate” similarly fails. (Compl. ¶ 54) (emphasis added). Once again, this
2 assertion stands as factually accurate. As the Complaint acknowledges, the program *could* be
3 completed more quickly than seven years depending on a student’s aptitude, diligence, and the
4 time and resources the student has to dedicate toward coursework and his or her dissertation.
5 Contrary to the FTC’s allegations, these representations regarding GCU’s doctoral programs
6 unequivocally lack any element of deception.

7 The Eleventh Circuit reached a similar conclusion in *Young v. Grand Canyon Univ., Inc.*, 57 F.4th 861 (11th Cir. 2023). There, a former GCU doctoral student alleged that GCU
8 promised in its enrollment agreement that students would finish their doctoral degrees in 60
9 credit hours. *Id.* at 868. After reviewing the same statements at issue here, the district court
10 dismissed the plaintiff’s claim, and the Eleventh Circuit affirmed. In its decision, the Eleventh
11 Circuit explained that the statements in GCU’s enrollment agreements are not misleading:
12

13 “Mr. Young fails to point to any provision in any of the relevant documents
14 promising that a student will complete his doctoral degree program in 60 (and
15 no more than 60) credit hours. This is because the documents belie any such
16 promise. For example, the Enrollment Agreement states that “[a] *minimum* of 60
17 credits are required for completion of this program of study.” And the fast track
18 reflected in the Optimal Progression Point column of the Dissertation Milestone
Table is not guaranteed. It merely reflects a potential path to completion if a
doctoral candidate puts forth maximum effort and succeeds at each relevant
stage. Mr. Young cannot state a claim for breach of contract on his 60-hour
theory absent language promising such an outcome.”

19 *Id.* at 871 (record citations omitted). As the Eleventh Circuit recognized in *Young*,
20 representations about a “potential path to completion” of a GCU doctoral degree do not
21 guarantee that outcome. *Id.* It is not deceptive for Defendants to provide truthful information
22 to prospective students about basic program requirements. If Plaintiff’s claims were viable,
23 students across the country would sue nearly every school whenever the student failed to
24 complete a degree program within the minimum number of credits required by the school.

25 At their core, doctoral studies programs are notoriously rigorous, and GCU’s doctoral
26 programs are no exception. That some students may require more courses than the minimum
27 number of courses to earn a degree does not render statements about the minimum
28

requirements deceptive.⁶

2. GCE Did Not Misrepresent the Tuition and Cost For A GCU Doctoral Program.

The FTC has also failed to allege an actionable representation—or any representation at all—by GCE regarding tuition and costs for GCU’s doctoral programs. The FTC cites only to the enrollment agreement’s statements about tuition, but those are not GCE’s documents or statements. (Compl. ¶ 53). Accordingly, any information in those documents does not reflect an alleged representation by GCE. Even assuming that the representations in those agreements could somehow be attributed to GCE, there is still no basis for a claim.

The FTC’s tuition allegations are based on “*estimates* of tuition costs for doctoral programs . . . based on the cost for 60 credits.” (Compl. ¶ 53) (emphasis added). As is clear from the Complaint, the estimate is based on a published “cost per credit” value that is centrally displayed on the enrollment agreement. (Compl. ¶ 52). It is inherent in the concept of an “estimate” that there may be variables that cause the estimate to fluctuate. Moreover, prospective students are provided with the information they need to calculate the cost of additional coursework beyond the minimum 60-credit requirement. There is nothing false or deceptive about this information.

The FTC has, thus, failed to identify an actionable representation to support Count II.

E. The FTC Has Failed to Plead Counts I, II, and III with Particularity.

Claims for violation of Section 5(a) of the FTC Act—and by extension the TSR—“sound in fraud” and are, therefore, subject to a heightened pleading standard under Rule 9(b). *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 853 (C.D. Cal. 2010) (claims for violation of

⁶ The FTC also alleges in support of Count II that Defendants market GCU doctoral programs that place students “on an accelerated path that will prepare you to succeed in your academic journey and career.” (Compl. ¶ 50). That language says nothing about how many credit hours, classes, or tuition expenses it takes to earn a degree and is not an actionable representation under the FTC Act. At most, it is advertising puffery, which is nonactionable under the FTC Act. *See, e.g., FTC v. Lights of Am. Inc.*, No. SACV 10-1333 JVS (MLGX), 2012 U.S. Dist. LEXIS 199754, at *24 (C.D. Cal. Apr. 25, 2012) (granting summary judgment for defendant where alleged violation of FTC Act amounted to mere advertising puff).

1 Section 5(a) of the FTC Act “sound in fraud”) (granting motion to dismiss for failure to meet
2 9(b) particularity requirements); *see also Prime Mktg. Holdings*, 2016 U.S. Dist. LEXIS
3 194873 at *6 (finding that the heightened pleading standard of Rule 9(b) applied to TSR claims
4 because they sounded in fraud); *FTC v. ELH Consulting, LLC*, No. CV 12-02246-PHX-FJM,
5 2013 U.S. Dist. LEXIS 126110, *4 (D. Ariz. 2013) (applying 9(b) to FTC claims alleging
6 telemarketers made “representations” that are “false”).

7 A claim “sounds in fraud” where a plaintiff “allege[s] a unified course of fraudulent
8 conduct” that forms the basis of its claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,
9 1100 (9th Cir. 2003). “Fraud can be averred by specifically alleging fraud, or by alleging facts
10 that necessarily constitute fraud (even if the word ‘fraud’ is not used).” *Id.* at 1105. For
11 example, in *Lights of America*, the FTC alleged that the defendants violated the FTC Act by
12 distributing promotional materials with false and misleading information about the
13 specifications of defendants’ LED lamp products. 760 F. Supp. 2d at 852-53. The *Lights of*
14 *America* court held that the FTC’s Section 5(a) claim “sound[ed] in fraud” because the
15 “gravamen of these allegations is that the [defendants] engaged in a unified course of
16 fraudulent conduct” to misrepresent the nature of the LED lamp products. *Id.* at 853 (granting
17 motion to dismiss for failure to plead fraud with particularity).

18 Here, like in *Lights of America*, the FTC has alleged that “Defendants” have made
19 misleading representations about a product—GCU’s educational services—in connection with
20 the advertising, marketing, or promotion of those services. (Compl. ¶¶ 71, 72, 88). Even
21 though the FTC does not use the word “fraud” in its allegations, “[t]he FTC’s omission of the
22 ‘magic word’—fraud—from its Complaint does not detract from the apparently fraudulent
23 nature of the allegations.” *Lights of Am.*, 760 F. Supp. 2d at 853 (quoting *Vess*, 317 F.3d at
24 1108). The FTC’s allegations are undeniably “grounded in fraud” and are subject to Rule
25 9(b)’s heightened pleading requirement. *Vess*, 317 F.3d at 1108; *FTC v. D-Link Sys.*, No.
26 3:17-cv-00039-JD, 2017 U.S. Dist. LEXIS 152319, at *4-5 (N.D. Cal. Sept. 19, 2017) (“The
27 FTC’s deception claims are premised on [...] misleading statements to consumers, and so Rule
28

1 9(b) must apply to them.”).⁷

2 The heightened pleading requirement in Rule 9(b) requires a plaintiff to plead the who,
3 what, when, where, and why of the fraud. A plaintiff’s allegations must be “specific enough
4 to give defendants notice of the particular misconduct so that they can defend against the
5 charge and not just deny that they have done anything wrong.” *FTC v. Johnson*, No. 2:10-cv-
6 02203-MMD-GWF, 2013 U.S. Dist. LEXIS 80341, at *24-25 (D. Nev. 2013) (quoting *Vess*,
7 317 F.3d at 1108). The Complaint falls woefully short of satisfying Rule 9(b) on several
8 grounds.

9 The FTC does not identify which Defendant engaged in which conduct. “Rule 9(b) does
10 not allow a complaint to merely lump multiple defendants together.” *FTC v. QYK Brands*
11 *LLC*, No. SACV 20-1431 PSG (KESx), 2021 U.S. Dist. LEXIS 229942, at *6 (C.D. Cal. Nov.
12 30, 2021) (applying 9(b) pleading standard to FTC Act claims) (quoting *Swartz v. KPMG LLP*,
13 476 F.3d 756, 765 (9th Cir. 2007)). But the Complaint improperly lumps GCE, GCU, and
14 Brian Mueller together in a series of allegations directed at “Defendants.” *See, e.g.*, Compl.
15 ¶¶ 9, 21-22, 24, 29, 40-45, 47, 49-55, 59, 62-65, 68, 70, 71, 86-88, 90-92. In each of these
16 instances, the context of the allegation suggests that the allegation may be directed at just one
17 defendant—the defendant who made the alleged representation or omission. And yet, the
18 Complaint fails to identify the relevant party.

19 Additionally, the Complaint fails to identify the relevant context for the alleged
20 misrepresentations. For example, the Complaint alleges that “Defendants” have described
21 GCU’s doctoral programs as “accelerated” programs, but the Complaint does not identify the
22 time, place, or context in which the alleged statement was made. (Compl. ¶ 50). In another
23 paragraph, the Complaint alleges statements by unidentified telemarketers trained by
24 unspecified “Defendants” without any specificity of who made the statements, when such
25 statements were made, or who trained the unidentified telemarketers. (Compl. ¶ 54). The
26 Complaint further alleges that unspecified “Defendants” (once again, referenced
27

28 ⁷ Moreover, the TSR is promulgated under the Telemarketing and Consumer **Fraud** and
Abuse Prevention Act, 15 U.S.C. § 6105 (emphasis added).

1 indistinguishably) distributed materials containing false or misleading statements. (Compl. ¶¶
2 51-53). In short, it is impossible to discern *who* the FTC alleges engaged in the challenged
3 conduct or made the alleged representations—much less *when* or *where* the alleged
4 representations were made.

5 Counts I, II, and III of the Complaint, thus, fail for the independent reason that they fall
6 short of Rule 9(b)'s heightened pleading requirement. *See Lights of Am.*, 760 F. Supp. 2d at
7 854-55 (C.D. Cal. 2010) (granting motion to dismiss Section 5 claim for failure to satisfy Rule
8 because “[t]he allegations do not differentiate between conduct committed by [each
9 defendant], nor do they explain when or where the alleged misrepresentations were made.”).

10 **V. CONCLUSION**

11 For these reasons, GCE requests that the Court grant its Partial Motion to Dismiss and
12 dismiss Counts I, II, and III from the Complaint.

13
14 Respectfully submitted this 9th day of February 2024.

15
16 /s/ Derin B. Dickerson

17 Derin B. Dickerson, GA Bar #220620*
18 Kathleen Benway, DC Bar #474356*
19 Caroline R. Strumph, GA Bar #250168*
Shanique Campbell, GA Bar #346659*
Lisa L. Garcia, CA Bar #301362*
20 *(*pro hac vice*)
ALSTON & BIRD LLP
21 1201 West Peachtree Street
Atlanta, GA 30309-3424

22
23 *Attorneys for Defendant Grand Canyon
Education, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2024, I caused to be electronically transmitted the attached document entitled GRAND CANYON EDUCATION, INC.'S PARTIAL MOTION TO DISMISS AND MEMORANDUM IN SUPPORT to the Clerk of the Court using the CM/ECF System, which will send notification of such filing and transmittal of a Notice of Electronic Filing to all registered CM/ECF users.

/s/ Derin B. Dickerson

Derin B. Dickerson